No. 07-____

83

IN THE

Supreme Court of the United States

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

TALIS J. COLBERG
Attorney General
STATE OF ALASKA
Department of Law
P.O. Box 110300
Juneau, AK 99811
(907) 465-3600

JONATHAN S. FRANKLIN*
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

CAMERON M. LEONARD
Assistant Attorney General
STATE OF ALASKA
Department of Law
100 Cushman Street
Suite 400
Fairbanks, AK 99701
(907) 451-2811

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

1. Whether the Ninth Circuit erred in invalidating the longstanding regulatory interpretation of the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA") that discharges of dredged or fill material are subject to the exclusive permitting authority of the Corps under Section 404 of the Clean Water Act, rather than effluent limitations and standards of performance promulgated under Sections 301 and 306 and applied by EPA pursuant to its separate permitting authority under Section 402.

PARTIES TO THE PROCEEDINGS

Petitioner in this case is the State of Alaska. The State was a defendant-intervenor and appellee below.

The Federal government respondents in this Court are the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); and the United States Forest Service. These respondents, or their predecessors in their official capacities, were defendant-appellees below. Mr. Wilson succeeded Colonel Timothy J. Gallagher as District Engineer. Mr. Rabbe succeeded Larry L. Reeder as Chief of the Regulatory Branch. Mr. Dunlop succeeded Dominic Izzo as Principal Deputy Assistant Secretary.

Coeur Alaska, Inc. and Goldbelt, Inc. are also respondents in this Court. These respondents were defendant-appellees below.

Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation are also respondents in this Court. These respondents were plaintiff-appellants below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	16
I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS	16
A. The Decision Below Conflicts With Decisions Of This And Other Courts Recognizing The Exclusive Authority Of The Corps Under Section 404	17
B. The Decision Below Conflicts With Decisions Of This And Other Courts Deferring To The Agencies' Determinations Of Their Regulatory Jurisdiction	21
II. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE	28
CONCLUSION	34

TABLE OF CONTENTS—Continued

Page

APPENDICES

Appendix A: Opinion of the U.S. Court of Appeals for the Ninth Circuit (May 22, 2007)..... 1a

Appendix B: Memorandum Decision of the U.S. District Court for the District of Alaska (Aug. 3, 2006)..... 35a

Appendix C: Order of the U.S. Court of Appeals for the Ninth Circuit Denying Rehearing and Rehearing En Banc (Oct. 29, 2007)..... 52a

Appendix D: Statutory and Regulatory Provisions Involved 54a

TABLE OF AUTHORITIES

Page

CASES:

Auer v. *Robbins*, 519 U.S. 452 (1997) 26

Bragg v. *Robertson*, 72 F. Supp. 2d 642 (S.D. W. Va. 1999), *vacated on other grounds*, 248 F.3d 275 (4th Cir. 2001) 8

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 14, 23

Greenfield Mills, Inc. v. *Macklin*, 361 F.3d 934 (7th Cir. 2004) 19

Kentuckians for the Commonwealth, Inc. v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) ..... *passim*

National Ass'n of Home Builders v. *U.S. Army Corps of Engineers*, 440 F.3d 459 (D.C. Cir. 2006) 20

National Ass'n of Home Builders v. *Defenders of Wildlife*, 107 S. Ct. 2518 (2007) ..... *passim*

National Wildlife Federation v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988) 24

Rapanos v. *United States*, 126 S. Ct. 2208 (2006) ..... *passim*

Resource Investments, Inc. v. *U.S. Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998) 8

Save Our Community v. *EPA*, 971 F.2d 1155 (5th Cir. 1992) 24

TABLE OF AUTHORITIES—Continued

Page

S.D. Warren Co. v. *Maine Bd. of Environmental Protection*, 126 S. Ct. 1843 (2006) 33

Sierra Club v. *El Paso Gold Mines, Inc.*, 421 F.3d 1133 (10th Cir. 2005) 20

Solid Waste Agency of Northern Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) 24

Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994) 26

United States v. *Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) 28

United States v. *Deaton*, 332 F.3d 698 (4th Cir. 2003) 25

United States v. *Hubenka*, 438 F.3d 1026 (10th Cir. 2006) 25

United States v. *Pozsgai*, 999 F.2d 719 (3rd Cir. 1993) 24

United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1983) 23

STATUTES:

28 U.S.C. § 1254(1) 2

Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816, as amended:

§ 301, 33 U.S.C. § 1311 ..... *passim*

§ 301(a), 33 U.S.C. § 1311(a) 14

§ 301(e), 33 U.S.C. § 1311(e) 15

TABLE OF AUTHORITIES—Continued

	Page
§ 306, 33 U.S.C. § 1316	*passim*
§ 306(e), 33 U.S.C. § 1316(e)	15
§ 401, 33 U.S.C. § 1341	*passim*
§ 402, 33 U.S.C. § 1342	*passim*
§ 402(a), 33 U.S.C. § 1342(a)	4, 5
§ 404, 33 U.S.C. § 1344	*passim*
§ 404(a), 33 U.S.C. § 1344(a)	*passim*
§ 404(b)(1), 33 U.S.C. § 1344(b)(1)	4
§ 404(c), 33 U.S.C. § 1344(c)	5
§ 404(f), 33 U.S.C. § 1344(f)	4
§ 404(p), 33 U.S.C. § 1344(p)	6, 17
Pub. L. No. 100-4 (1987)	10
Pub. L. No. 102-580, § 364(1) (1992)	10
Pub. L. No. 104-66, § 2021(e)(2) (1995)	10
Pub. L. No. 106-554, § 1(a)(4) (2000)	9
REGULATIONS:	
33 C.F.R. § 323.2(e)	*passim*
33 C.F.R. § 323.2(f)	9, 27
40 C.F.R. § 122.3(b)	*passim*
40 C.F.R. § 230.10(c)(2), (3)	4
40 C.F.R. § 230.1(a)	4
40 C.F.R. § 230.5(c)	5
40 C.F.R. § 232.3(e)(1)	27
40 C.F.R. Parts 405-471	32
40 C.F.R. § 434.22	31
40 C.F.R. § 436.182	31

TABLE OF AUTHORITIES—Continued

	Page
40 C.F.R. § 440.104	31
40 C.F.R. § 440.104(b)(1)	13
ADMINISTRATIVE MATERIALS:	
42 Fed. Reg. 37,122 (1977)	6
42 Fed. Reg. 37,145 (1977)	6
48 Fed. Reg. 14,153 (1983)	7
48 Fed. Reg. 14,157-58 (1983)	7
51 Fed. Reg. 8,871 (1986)	8, 27
53 Fed. Reg. 20,764 (1988)	7
65 Fed. Reg. 21,292 (2000)	*passim*
65 Fed. Reg. 21,293 (2000)	*passim*
67 Fed. Reg. 31,129 (2002)	2, 8
67 Fed. Reg. 31,130 (2002)	8, 33
67 Fed. Reg. 31,131 (2002)	32
67 Fed. Reg. 31,132-33 (2002)	9, 25
67 Fed. Reg. 31,133 (2002)	25
67 Fed. Reg. 31,135 (2002)	*passim*
OTHER AUTHORITIES:	
Jim Calvin, *The Kensington Project: Economic Impact Update* (2007) (www.juneau.org/assembly/agendas /2007/2007-07-17_Special/2007-07-17-Assembly_ Index.php)	30
Kim Connolly et al., *Wetlands Law and Policy: Understanding Section 404* (2005)	33

TABLE OF AUTHORITIES—Continued

Page

Sharon M. Mattox, *Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Issues*, SN032 ALI-ABA 1571 (Oct. 19, 2007) 32

D. J. Szumigala & R. A. Hughes, *Alaska's Mineral Industry 2006: A Summary* (2007) (http://dggs.dnr.state.ak.us/pubspubs?reqtype=minerals) 30

U.S. Dept. of Commerce, Bureau of Economic Analysis, *Gross Domestic Product By State* (www.bea.gov/regional/gsp/) 30

U.S. Fish & Wildlife Service, *Status of Alaska Wetlands* (1994) (http://wetlands fws.er.usgs.gov/status_trends/St_and_Reg_Reports/Alaska_Status.pdf) 31

U.S. Dept. of Labor, Bureau of Labor Statistics, *Alaska Economy at a Glance* (http://stats.bls.gov/eag/eag.ak.htm) 30

IN THE

Supreme Court of the United States

No. 07-____

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of Alaska (the "State") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit is available at 486 F.3d 638 and is reproduced at page 1a of the appendix to this petition ("App."). The unpublished order of the District Court is reproduced at App. 35a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 22, 2007. App. 1a. That court denied timely filed petitions for rehearing and rehearing en banc

on October 29, 2007. App. 52a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statutes and regulations is set forth in the appendix to this petition. App. 54a.

INTRODUCTION

This case involves a question of fundamental importance to the operation of the Clean Water Act ("CWA") and to petitioner the State of Alaska. The CWA contains two separate and mutually exclusive permitting programs. Under Section 404, the Army Corps of Engineers (the "Corps") is given the authority to permit discharges of "dredged or fill" material into the waters of the United States through guidelines specific to that program. Under Section 402, the Environmental Protection Agency ("EPA") is given the authority to permit discharges of other material through its separate effluent guidelines promulgated under Sections 301 and 306 of the Act. As this Court has recognized, Section 404 is a "separate permitting program" from Section 402. *Rapanos* v. *United States*, 126 S. Ct. 2208, 2228 (2006) (plurality); *see also id.* at 2237 (Kennedy, J., concurring) ("Apart from dredged or fill material, pollutant discharges require a permit from the Environmental Protection Agency").

For more than 20 years, the Corps and EPA have likewise recognized the mutually exclusive nature of these two permitting programs. Indeed, "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,129, 31,135 (2002) (emphasis supplied). Thus, EPA regulations have consistently provided that discharges of dredged or fill material are regulated by the Corps under

Section 404 and do not require a permit from EPA under Section 402. *See* 40 C.F.R. § 122.3(b).

In this case, however, the Ninth Circuit tossed aside these decades of regulatory practice and the jurisdictional boundaries carefully delineated by the agencies, holding that the permitting authority of the Corps is trumped by EPA's separate effluent guidelines. In so doing, the court not only invalidated a carefully-considered permit for a project of great importance to Alaska and its citizens, but ensured that a wide swath of industries and agencies will be subject to different permitting requirements in the Ninth Circuit than in the rest of the country.

A decision of this magnitude warrants this Court's review. The Ninth Circuit's decision conflicts with precedents of this Court and other lower courts holding that the permitting schemes of Sections 404 and 402 are mutually exclusive, and that the agencies are entitled to deference regarding the kinds of discharges subject to each program. The issue, moreover, is of great importance not only to Alaska but to all states and regulated industries that have for decades relied on EPA's and the Corps' reasonable interpretation of their regulatory authority under the CWA.

STATEMENT OF THE CASE

1. The Statutory Scheme. The CWA allows the discharge of material into waters of the United States pursuant to a permit issued either by the Corps under Section 404, 33 U.S.C. § 1344, or by EPA under Section 402, 33 U.S.C. § 1342.

Section 404 provides, in pertinent part, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters"

under guidelines developed jointly by the Corps and EPA. 33 U.S.C. § 1344(a).[1] Section 402 provides, in pertinent part, that

> *[e]xcept as provided in section[] * * * 1344 of this title* [*i.e.*, Section 404 of the CWA], the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant, or combination of pollutants * * * upon condition that such discharge will meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

33 U.S.C. § 1342(a) (emphasis added). The two programs are thus mutually exclusive. Under Section 404, the Corps may issue permits for the discharge of "dredged or fill material," whereas under Section 402 EPA may issue permits for the discharge of pollutants "[e]xcept as provided in [Section 404]."

Section 404 permitting is a rigorous process. The governing regulations, known as the Section 404(b)(1) Guidelines, are developed by EPA in conjunction with the Corps specifically for the Section 404 program. 33 U.S.C. § 1344(b)(1). Under the Guidelines, "discharges having significant adverse effects on aquatic ecosystems are not allowable." 65 Fed. Reg. 21,292, 21,293 (2000) (citing 40 C.F.R. § 230.10(c)(2), (3)). The goal of the Guidelines is "to restore and maintain the chemical, physical, and biological integrity of waters of the United States." 40 C.F.R. § 230.1(a). The Guidelines require "careful consideration of the effects of the discharge on the aquatic ecosystem as a whole, as well as evaluation

---

[1] The only exceptions are for certain farming practices, not at issue here, which require no permits under either Section 404 or Section 402. *See* 33 U.S.C. § 1344(f).

of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects." 65 Fed. Reg. 21,293 (2000). The Guidelines require use of the least environmentally damaging practicable alternative. 40 C.F.R. § 230.5(c).

Under Section 404, EPA retains veto power over a permit issued by the Corps. EPA may veto any Section 404 permit if it determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * *, wildlife, or recreational areas." 33 U.S.C. § 1344(c).

EPA's separate permitting authority under Section 402—also referred to as the National Pollutant Discharge Elimination System ("NPDES")—is subject to different requirements. Unlike Section 404, which contains no such restrictions, Section 402 provides that an EPA permit must "meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title." 33 U.S.C. § 1342(a). Most notably among that list, EPA permits must comply with applicable EPA-established "effluent limitations" under Section 301 of the CWA for existing sources, 33 U.S.C. § 1311, and "performance standards" under Section 306 for new sources, 33 U.S.C. § 1316.[2]

Under Section 401 of the CWA, both EPA and the Corps are further restricted by the States' authority. 33 U.S.C. § 1341. To receive a permit under either Sections 402 or 404, an applicant must obtain a

[2] The substance of these two categories of standards is generally congruent. This petition will refer to them collectively as "effluent guidelines," as they are commonly referenced by EPA. *See also* App. 13 n.8 ("A standard of performance is one type of effluent limitation.").

"certification from the State in which the discharge originates * * * that any such discharge will comply with" applicable federal and state laws. *Id.* Under Section 401, states such as Alaska have an independent interest in ensuring the proper application of the CWA, since they must independently certify, *inter alia*, that any applicable provisions of Sections 301 and 306 have been complied with. *See id.*

Tying the scheme together, Section 301(a) contains a general compliance requirement stating that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). And reinforcing the mutual exclusivity of the two permitting schemes, Section 404(p) expressly provides that "compliance with a permit issued under [Section 404] constitutes compliance with * * * [Section 301]." 33 U.S.C. § 1344(p).

2. The Agencies' Interpretation. Over the years, the Corps and EPA refined their definition of what constitutes "fill material" under Section 404. But the agencies have been consistent on the central point at issue in this case: that the Corps has exclusive jurisdiction, under Section 404, to issue permits for the discharge of dredged or fill material and that discharges of such material are not subject to permitting by EPA under Section 402 or EPA's effluent guidelines applied thereunder.

In 1977, the Corps adopted a purpose-based test for determining which discharges fell under its Section 404 authority. It defined "fill material" as any discharge that had the primary *purpose* of replacing an aquatic body or raising its bottom elevation. 42 Fed. Reg. 37,122, 37,145 (1977). Meanwhile, EPA

had an *effects*-based test, which placed under the Corps' Section 404 authority "any pollutant which replaces portions of the waters of the United States with dry land or which changes the bottom elevation of a water body for any purpose." 65 Fed. Reg. 21,292, 21,295 (2000). "The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S." because parties were unsure under which permit program their discharges fell. 53 Fed. Reg. 20,764 (1988).

The agencies would not finally reconcile their definitions of "fill material" until 2002. But they have been consistent that discharges of fill material are regulated by the Corps under Section 404 and are not subject to the EPA effluent guidelines that are applied under Section 402. As the agencies stated unequivocally in 2002, "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135 (emphasis supplied).

As far back as 1983, EPA promulgated a regulation, which is still in place today, providing:

> The following discharges *do not require NPDES [i.e., Section 402] permits*:
>
> * * *
>
> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

40 C.F.R. § 122.3(b) (emphasis added) (promulgated at 48 Fed. Reg. 14153, 14157-58 (1983)). Thus, if a discharge meets the statutory and regulatory definition of "dredged or fill material," it has never required a Section 402 permit from EPA.

In 1986, the Corps and EPA enacted a joint regulation adopting a Memorandum of Agreement

("MOA") between the agencies. 51 Fed. Reg. 8,871 (1986). The MOA governed the process by which the agencies would determine whether a discharge was "fill material" regulated by the Corps under Section 404 or "waste" regulated by EPA under Section 402. *See* 67 Fed. Reg. 31,129, 31,138 (2002); 33 C.F.R. § 323.2(e) (excluding disposal of waste from definition of "fill material"). The agencies reconfirmed, however, that the Corps' jurisdiction to permit discharges meeting the definition of fill material was exclusive: "[d]ischarges listed in the Corps definition of 'discharge of fill material,' remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8,871 (1986).

Following the MOA, some confusion remained. For instance, the Ninth Circuit ruled that the Corps could not use the Section 404 permit process to regulate discharges of solid waste because the "primary purpose" of the discharge was not "to replace an aquatic area with dry land or to change the bottom elevation of a waterbody." *Resource Investments, Inc.* v. *U.S. Army Corps of Engineers*, 151 F.3d 1162, 1168-69 (9th Cir. 1998). *See also Bragg* v. *Robertson*, 72 F. Supp. 2d 642, 656-57 (S.D. W. Va. 1999), *vacated on other grounds*, 248 F.3d 275 (4th Cir. 2001).

That confusion led the Corps and EPA to promulgate a joint definition of "fill material" in 2002. 67 Fed. Reg. at 31,130. The rule adopted EPA's "effects-based" test, defining fill material as "material placed in the waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any

portion of a water of the United States." 33 C.F.R. § 323.2. The agencies declared that the joint definition was advantageous over the purpose-based definition because its objectivity would yield more consistent results and because "discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. at 31,132-33.

The regulations also addressed the precise point at issue in this case. The regulations expressly provide that "fill material" includes the "placement of overburden, slurry, or tailings, or similar mining-related materials." 33 C.F.R. § 323.2(f). As if this were not clear enough, the agencies further stated that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" and that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials." 67 Fed. Reg. at 31,135 (emphasis added). The agencies also clarified that they would "maintain [their] existing approach to regulating pollutants under either section 402 or 404 of the CWA." *Id.* Thus, fill material would not be regulated under EPA effluent guidelines, and discharges of such material would not require an EPA permit under Section 402.

Despite ample opportunity, Congress has never suggested that the Corps and EPA were wrong in concluding that the Corps has exclusive authority to permit discharges of dredged or fill material pursuant to the Section 404(b)(1) Guidelines. During the two decades in which the Corps and EPA have consistently drawn the line between Sections 402 and 404, Section 402 has been amended four times, and Section 404 once. *See* Pub. L. No. 106-554,

§ 1(a)(4) (2000); Pub. L. No. 104-66, § 2021(e)(2) (1995); Pub. L. No. 102-580, § 364(1) (1992); Pub. L. No. 100-4 (1987). None of the amendments touched on, much less altered, the agencies' position that discharges subject to the Corps' jurisdiction under Section 404 are not subject to EPA's jurisdiction under Section 402 or its effluent guidelines.

3. The Kensington Mine. Since 1990, Coeur Alaska, Inc. ("Coeur") and its predecessor have worked with federal and state agencies to develop the historic Kensington Mine, a gold mine located in Southeast Alaska.

The Corps, EPA, the U.S. Forest Service, and the State have studied the Kensington Mine Project thoroughly, resulting in three environmental impact statements, four records of decision in 1992, 1997, 2004, and 2006, and numerous other studies, plans, and memoranda. *See* Ninth Cir. Excerpts of Record ("ER") at 388; Ninth Cir. Supplemental Excerpts of Record ("SER") at 852. Over that time, Coeur, in conjunction with state and federal agencies, evaluated multiple alternatives for storing the discarded "tailings" from which the gold is to be extracted. ER 388. Tailings are simply ground up rock and earth that is left after the gold is extracted, and are thus similar to wet sand. App. 38a. Metals concentrations in the Kensington tailings are comparable to those in nearby lake sediments, SER 746, and most chemicals added in the mill do not remain in the tailings, ER 326, 605; SER 853. All told, more than 900 studies have been completed, at a cost of over $26 million, to demonstrate the project's environmental soundness. SER 800. The State expended significant resources in conducting numerous tests of

its own, and in contracting to have independent studies performed. SER 786-99, 801, 953-57.

In November 2001, Coeur submitted the proposal at issue in this case. The proposal involves backfilling 40 percent of tailings into the mine and placing the remainder as "fill material" in an impoundment created in Lower Slate Lake, a nearby 23-acre lake. The tailings were to be transported to the lake in slurry form. App. 38a. The tailings slurry is 55% solid by weight. ER 290, 302, 605. "To ensure water quality standards for the project [were] met, all water from the impoundment [would] have to go to and through a water treatment plant during operation." SER 853. Because of its relatively inhospitable characteristics, Lower Slate Lake has a "non-diverse, sparsely populated, assemblage of small fish." SER 943. Although the tailings have minimal toxicity risks, SER 786, it has been estimated that aquatic life in the lake would be lost initially due to the fill characteristics of the tailings rather than any toxicity. App. 39a. The plan, however, requires restoration of the lake in a way that would "provide at least equivalent aquatic habitat and productivity as it does currently." App. 40a.

4. The Section 404 Permit. Because the plan involved fill material, Coeur sought a Section 404 permit from the Corps. The Corps and EPA concluded (1) that the tailings are "fill material" under the governing regulations that expressly apply to such material, 33 C.F.R. § 323.2(e), (f); and (2) that a permit was thus expressly authorized by the plain language of Section 404 of the CWA. ER 853, 903. The agencies also concluded that the water coming *from* the tailings impoundment through the

treatment plant is wastewater effluent subject to EPA permitting under Section 402. ER 534.

The Corps issued a final decision in December 2004. ER 308-411. This decision compared Coeur's proposal with alternatives, several of which involved placing the tailings in a dry facility that would be constructed partially by filling in a neighboring wetland. ER 317-22. This method, however, would have resulted in "the permanent loss of 34 to 113 acres of aquatic habitat." SER 868. Both the State and the Forest Service therefore preferred a plan that involved depositing tailings as fill material in the relatively small Lower Slate Lake impoundment. ER 391-92. Under that plan, under five acres of aquatic habitat would be lost but the lake would be enlarged. SER 869-70. The Corps found that the habitat loss "is small in the context of [the nearby] Berners Bay and is considered a minimal loss of functions and values." SER 869.

After carefully considering the various alternatives, the Corps found that the plan that included using tailings as fill material in the lake "provide[d] the best combination of components to minimize ground disturbance, reduce impacts to wetlands, provide safe and efficient transportation of workers, and reduce on-site fuel storage with the related risk of fuel spills within the framework of existing laws, regulations, and policies while meeting the stated purpose and need." ER 392. The Corps also found that using the tailings as fill in the lake, with proposed mitigation measures, "is the environmentally preferable alternative." ER 395-96. The mitigation measures include methods to filter out and confine suspended particles, as well as adding non-toxic precipitates to promote rapid settling of the tailings.

App. 37a.; ER 526; SER 924. Coeur has also posted a bond to assure compliance with an approved reclamation plan and with long-term maintenance and monitoring of the impoundment. App. 40a n.25; SER 965. EPA consented to this plan. ER 534.

EPA also issued a separate Section 402 permit regulating the discharge of water from the tailings impoundment to downstream waters. ER 534-49; SER 656-65. As required by Section 401 of the CWA, the State further certified that the plan met its own water quality standards. SER 953-57. The Project also received additional state and local permits. ER 397. Collectively, these permits require extensive design and operating elements, as well as numerous monitoring and other requirements to protect water quality and the environment. *See*, *e.g.*, ER 396, 528; SER 662-65, 674-85, 956-57.

5. District Court Proceedings. Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, "SEACC") sued the Corps in the District of Alaska to enjoin its grant of the permit. App. 36a. The State, Coeur, and Goldbelt, Inc. (a local native corporation) intervened as defendants. App. 36a.

SEACC contended that the permitting process for impounding the tailings—not just for the effluent coming from the tailings impoundment—is governed by EPA under Section 402 rather than the Corps under Section 404. SEACC contended that under Section 402 Coeur's discharge of tailings into the impound could not be permitted because it allegedly does not comply with an EPA performance standard applicable to discharges of "process wastewater" from mining activities. *See* 40 C.F.R. § 440.104(b)(1).

The District Court found the Corps' permit valid. App. 50a. The court summarily rejected SEACC's contention that the permit was barred by the CWA's general prohibitions relating to effluent guidelines, holding that "[i]f the permit was properly issued under § 404, those provisions of the CWA are inapplicable." App. 43a n.35. The court then reviewed the agencies' regulations defining "fill material" deferentially under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), finding that EPA and the Corps clearly defined the statutory term "fill material" to include the tailings slurry at issue, and that the definition did not conflict with the CWA. App. 44a, 47a. The court also rejected SEACC's claim that the tailings slurry could not meet the agencies' intent when they promulgated the definition of fill material. App. 49a.

6. The Ninth Circuit's Decision. The Ninth Circuit reversed with directions to vacate the Corps' permit. The Ninth Circuit did *not* overturn the agencies' conclusion that the material in this case is "fill material" subject to permitting by the Corps under Section 404. Rather, the Court held that this authority granted to the Corps is trumped by EPA's authority and that no permit could be issued because the discharge did not meet EPA's effluent guideline for process wastewater from mining activities.

First, the Ninth Circuit focused on Section 301 of the CWA, which declares discharges of pollutants unlawful "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1328, 1342, and 1344." 33 U.S.C. § 1311(a). The Ninth Circuit held that the use of the word "and" unambiguously means that any discharge has to comply with *all* of the listed sections, including *both* Section 402 and

404. App. 12a-13a. Because the court found that the tailings discharge would not meet EPA's effluent guidelines, it held that no permit could be issued at all. The court, however, ignored that the several statutes cited in Section 301 cover different—and often mutually exclusive—ground, meaning that all sources cannot comply with *all* of the provisions cited but rather can only comply with the applicable ones.

Second, the court found that Sections 301(e) and 306(e) of the CWA, 33 U.S.C. §§ 1311(e), 1316(e)—which direct compliance with EPA effluent guidelines where applicable—unambiguously provide that the Corps may not permit a discharge of fill material under Section 404 if it is subject to those guidelines. App. 16a. Even though Section 404 authorizes the Corps to permit discharges of any fill material, subject only to the guidelines developed under that section, and even though Section 404—unlike Section 402—does *not* require that such discharges follow EPA effluent guidelines, the court held that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism" for the discharges at issue. App. 17a.[3]

Finally, the court held that the "regulatory history" showed that neither agency intended for the Corps to have permitting authority under Section 404 where a

[3] The defendants had explained that the general provisions of Sections 301(e) and 306(a) do not trump the authority of the Corps because they merely require compliance with *applicable* provisions of the Act, and because the effluent guidelines are not applicable under Section 404. *See* 33 U.S.C. § 1311(e) (effluent limitations are to be applied to all discharges "in accordance with the provisions of this chapter"); 33 U.S.C. 1316(e) (it is unlawful to operate new source in violation of any EPA-promulgated performance standard "applicable" to such source). The Ninth Circuit did not address those arguments.

discharge is subject to an EPA effluent guideline. App. 18a. The Court relied on excerpts from the preamble to the 2002 regulation stating that the rule does not change "any determination [the agencies] have made" regarding discharges subject to Section 402; that Section 402 and Section 404 permits are mutually exclusive; and that "if EPA has previously determined that certain materials are subject to an [effluent limitation] under specific circumstances, then that determination remains valid." App. 26a-28a (emphasis removed). Based principally on these snippets, the court held that "[t]he agencies could not have been more clear" in articulating their "preferred approach" that Section 404 and the fill material regulations should apply only to material not subject to EPA effluent guidelines. App. 29a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The plain language of Section 404 of the CWA provides that the Corps "may issue permits * * * for the discharge of dredged or fill material," 33 U.S.C. § 1344(a), if the discharge meets the guidelines developed under Section 404 and is not vetoed by EPA. The Ninth Circuit conceded that the tailings at issue here are "fill material" as that term has been authoritatively construed by the agencies. *See* App. 9a (recognizing that discharge at issue "facially meets the Corps' current regulatory definition of 'fill material'"). Yet the Ninth Circuit has now held that the Corps *may not* issue—on any terms—the permit that Section 404 so clearly states it *may* issue. Not only does this holding contravene the plain language of the statute, but it contravenes decisions of this

Court and other circuits recognizing the exclusive permitting authority of the Corps under Section 404, and deferring to the agencies' reasonable determinations regarding their own regulatory jurisdiction. This Court should resolve this conflict in order to ensure the proper, uniform application of the CWA throughout the United States.

A. The Decision Below Conflicts With Decisions Of This And Other Courts Recognizing The Exclusive Authority Of The Corps Under Section 404.

For more than 20 years, the two federal agencies have consistently understood that the permitting procedures and regulations applied by the Corps under Section 404, and not those applied by EPA under Section 402, control *all* discharges of "fill material" into the waters of the United States. *See, e.g.*, 67 Fed. Reg. at 31,135 ("EPA has *never* sought to regulate fill material under effluent guidelines") (emphasis added); 40 C.F.R. § 122.3(b) (stating that "[d]ischarges of dredged or fill material" "do not require NPDES permits" from EPA).

The CWA itself states that compliance with a Section 404 permit constitutes compliance with Section 301, including its effluent limitations, 33 U.S.C. § 1344(p), and a majority of this Court has recognized the clear statutory dichotomy between regulation of fill material by the Corps and regulation of effluent by EPA. In *Rapanos*, *supra*, the plurality noted that, because dredged and fill material is inherently different from the kinds of discharges regulated by EPA, the CWA "recognizes this distinction by providing a *separate permitting program* for such discharges in § 1344(a) [CWA § 404(a)]." *Rapanos*, 126 S. Ct. at 2228 (plurality)

(emphasis added). Justice Kennedy, whose opinion was controlling in that case, also recognized the same point, noting that "*[a]part from dredged or fill material*, pollutant discharges require a permit from the Environmental Protection Agency." *Id.* at 2237 (Kennedy, J., concurring) (emphasis added).

As noted in *Rapanos*, Congress established a separate permitting scheme for dredged and fill material because "[i]n contrast to the pollutants normally covered by the permitting requirement of [Section 402(a)], 'dredged or fill material,' which is typically deposited for the sole purpose of staying put, does not normally wash downstream." 126 S. Ct. at 2228. This dichotomy is part of the basic structure of the CWA. "[F]rom the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream" is generally prohibited by Section 301 without a Section 402 permit from EPA. *Id.* at 2227 (emphasis removed). Thus, "the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an 'addition . . . to navigable waters'"—the definition of a discharge of pollutants subject to permitting under Section 402—"while the deposit of *stationary* fill material generally is not." *Id.* at 2228 n.11 (quoting 33 U.S.C. § 1362(12)) (emphases in original).[4]

---

[4] Fill material can produce alluvium and silt that "makes its way downstream." *Rapanos*, 126 S. Ct. at 2263 (Stevens, dissenting). When this happens, however, the resulting downstream discharges are regulated separately under Section 402. In this case, for example, even though the initial deposit of fill material into the Lower Slate Lake impoundment was subject to permitting by the Corps under Section 404, subsequent discharges from the impoundment into navigable waters were subject to permitting by EPA under Section 402.

Circuits other than the Ninth have likewise recognized that Sections 404 and 402 are mutually exclusive permitting schemes and that fill material is regulated by the Corps' Section 404(b)(1) Guidelines rather than by EPA's Section 402 effluent guidelines. In *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003), the court considered—and rejected—the argument that "fills created from coal mining activities could only be regulated under § 402 of the Clean Water Act as administered by the EPA, not under § 404 as administered by the Corps." *Id.* at 432. Just as in this case, *Kentuckians* involved the disposal of mining waste that had the effect of filling waterbodies. The court, however, upheld the "longstanding and consistent division of authority between the Corps and the EPA with regard to the issuance of permits under CWA Section 402 and CWA Section 404." *Id.* at 445. In so holding, the Fourth Circuit recognized that "[w]hile the statute authorizes the EPA to issue permits 'for the discharge of any pollutant,' * * * the EPA is not authorized to issue a permit for 'fill material.'" *Id.* at 443 (citing CWA § 402(a)(1)). Rather, EPA's role in the Section 404 process is limited to its veto power granted in Section 404(c). *Id.*

Other circuits have likewise recognized that discharges subject to Section 404's permit procedures are not subject to Section 402. For example, in *Greenfield Mills, Inc.* v. *Macklin*, 361 F.3d 934, 946 n.14 (7th Cir. 2004), the Seventh Circuit held that discharges of dredged material must be reviewed "by reference to § 404," rather than Section 402 because "§ 404 is the permitting scheme that regulates discharges of dredge and fill material, which is the category of discharge at issue here, and thus is the

permitting scheme relevant to this case." Similarly, in *Sierra Club* v. *El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1145 (10th Cir. 2005), the Tenth Circuit noted the mutual exclusivity of the two schemes: "whereas Section 402 addresses the 'discharge of any pollutant,' Section 404 addresses 'discharge of dredged or fill material.'" *See also National Ass'n of Home Builders* v. *U.S. Army Corps of Engineers*, 440 F.3d 459, 460 n.1 (D.C. Cir. 2006) (whereas "[t]he Corps has jurisdiction under CWA section 404 over discharge of dredged and fill material[,] EPA has jurisdiction under CWA section 402, over discharge of other pollutants") (citations omitted) (dictum)

The Ninth Circuit attempted to distinguish *Kentuckians* on the grounds that "EPA had not promulgated a performance standard" for the coal mining at issue there, and that the Corps had allegedly found that its authority was restricted by EPA effluent guidelines. App. 28a n.15. These distinctions do not hold water. The Fourth Circuit upheld the agencies' longstanding determination "to divide the statutory responsibilities * * * by defining 'fill material' that is subject to regulation by the Corps and 'waste' that is subject to regulation by the EPA through the administration of effluent limitations." *Kentuckians*, 317 F.3d at 446. The court did not base its holding on the fact that effluent guidelines do not cover coal mining. Rather, the court upheld the agencies' conclusion that material meeting the definition of "fill material" under Section 404 is—for that reason—not subject to the authority of EPA to regulate through its effluent guidelines. As the court noted, "the Clean Water Act clearly intended to divide functions between the Corps and the EPA based on the type of discharge involved,"

which supports the "fill-effluent distinction that has been followed by the agencies." *Id.*, at 447.

In direct contrast, the Ninth Circuit here obliterated the "fill-effluent distinction" that the Fourth Circuit upheld in *Kentuckians*. Under its decision, discharges of fill material will no longer be within the exclusive purview of the Corps under Section 404 but will also require entities such as Coeur to seek a permit from EPA under Section 402 for discharges that meet the definition of "fill material." *See* App. 17a (holding that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism" for the discharges at issue). This erasure of a clear jurisdictional line maintained by the expert agencies for more than two decades warrants this Court's review.

B. The Decision Below Conflicts With Decisions Of This And Other Courts Deferring To The Agencies' Determinations Of Their Regulatory Jurisdiction.

The Ninth Circuit further put itself in opposition to decisions of this Court and other circuits by overriding the reasoned and reasonable determinations of the Corps and EPA regarding their own respective regulatory jurisdictions, rather than deferring to them under *Chevron*. Indeed, the Ninth Circuit even went so far as to invalidate the agencies' reasoned interpretation of their *own* regulations. Certiorari is further warranted in light of this departure from settled law.

1. Section 404 provides that the Corps "may issue permits" for the discharge of dredged and fill material into specified disposal sites if the sites comply with guidelines issued under Section 404,

subject to EPA's veto right if the permit would have unacceptable adverse effects on the environment. *See* 33 U.S.C. § 1344. There is no question that this case involves "fill material" as the agencies have authoritatively construed that term. Yet the Ninth Circuit has now held that other provisions of the CWA are purportedly unambiguous that the Corps *may not issue* such permits, even where the disposal site meets the Section 404 guidelines and even where EPA has not vetoed. Even if the Ninth Circuit were right about these other provisions—and it is not—there would still be a conflict with the plain language of Section 404. Thus, by not deferring to the agencies' reasonable resolution of this issue, the Ninth Circuit placed itself in further opposition to the precedents of this Court and of other circuits.

Just last term, in *National Ass'n of Home Builders* v. *Defenders of Wildlife* 127 S. Ct. 2518 (2007) ("*NAHB*"), this Court reversed a Ninth Circuit decision that failed to defer to agencies' determinations of their respective jurisdictions involving the CWA. The Ninth Circuit had held that before transferring Section 402 permitting authority to a state, EPA must comply with a provision of another statute (the Endangered Species Act ("ESA")) administered by a different agency. This Court held that the ESA provision must be read against CWA provisions "whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below." *Id.* at 2534. As a result, the Court was "left with a fundamental ambiguity that is not resolved by the statutory text" because "[a]n agency cannot simultaneously obey the differing mandates." *Id.* Given that "the statutory language * * * [did] not itself provide clear guidance

as to which command must give way," the Court found it "appropriate to look to the implementing agency's expert interpretation," which "harmonizes the statutes." *Id.* Because the interpretation was "reasonable in light of the statute's text and the overall statutory scheme," the Court held that it was "entitled to deference under *Chevron*." *Id.*

This case is déjà vu. Under the Ninth Circuit's reasoning, there are conflicting statutory mandates here. Section 404 clearly provides that the Corps may issue permits for the discharge of the fill material at issue here, whereas, according to the Ninth Circuit, other provisions say that the Corps may not do so. Even if that were right, there would be "a fundamental ambiguity that is not resolved by the statutory text" because "[a]n agency cannot simultaneously obey the differing mandates." *Id.* The court thus erred in not deferring to the reasonable resolution reached by the expert agencies charged by Congress with the task of administering the allegedly conflicting provisions. The court did exactly what *Chevron* forbids: it "substitute[d] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844.

This Court has long accorded dispositive deference to the Corps' determinations of its Section 404 jurisdiction. In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Corps had construed the extent of its Section 404 authority. The Court properly deferred to the Corps' interpretation of its jurisdiction, holding that "we cannot say that the Corps' conclusion * * * —based as it is on the Corps' and EPA's technical expertise—is unreasonable." *Id.* at 134. The Court has found that

the Corps exceeded its Section 404 authority only where—unlike here—the agency "invoke[d] the outer limits of Congress' power" under the Commerce Clause. *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"); *see also Rapanos*, 126 S. Ct. at 2225. In those circumstances, the Court has required "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172.

The lower courts have followed suit, applying *Chevron* deference to the Corps' interpretation of its jurisdiction under Section 404. Most notably, in *Kentuckians*, the Fourth Circuit deferred to the agencies' division of responsibilities under Sections 402 and 404, holding that "the resolution among agencies of the line dividing their responsibilities is just the type of agency action to which the courts must defer." 317 F.3d at 446. Other circuits have similarly deferred to the determinations of the Corps and EPA regarding their respective jurisdictions.[5] And following this Court's reasoning in *SWANCC*, the Corps' exercise of jurisdiction under Section 404

---

[5] *See National Wildlife Federation* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988) (deferring to EPA's interpretation of its Section 402 jurisdiction where there were "no compelling indications" in the statute, legislative history or elsewhere that the construction was erroneous); *United States* v. *Pozsgai*, 999 F.2d 719, 728 (3rd Cir. 1993) (deferring to the Corps' interpretation of its Section 404 jurisdiction); *Save Our Community* v. *EPA*, 971 F.2d 1155, 1163 (5th Cir. 1992) (deferring to Corps and EPA determination that regulation of draining wetlands is not within their regulatory authority under Sections 402 or 404).

has been consistently upheld where it does not push constitutional limits.[6]

The Ninth Circuit's decision in this case conflicts with these precedents. As in *Riverside Bayview*, the agencies' division of regulatory responsibilities was based on their technical expertise and does not implicate any constitutional concerns. Indeed, the basis for that division is the same one noted in *Rapanos*: fill material, by definition, "is typically deposited for the sole purpose of staying put" as opposed to other pollutants that wash downstream. *Rapanos*, 126 S. Ct. at 2228. As the agencies have noted, "[f]ill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason, the section 404 permitting process focuses on different considerations than the section 402 permitting program." 65 Fed. Reg. at 21,293. The agencies thus adopted a uniform definition of fill material to "ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. at 31,133.

The Ninth Circuit has now thrown this two decades of regulatory work overboard. No longer will discharges of fill material be treated uniformly throughout the nation. Instead, in the states

---

[6] *See United States* v. *Hubenka*, 438 F.3d 1026, 1032 (10th Cir. 2006) (deferring to Corps' interpretation of Section 404 where the rule "neither invokes the outer limits of Congress' power nor raises significant constitutional questions"); *United States* v. *Deaton*, 332 F.3d 698, 708 (4th Cir. 2003) (deferring to Corps' interpretation of its Section 404 authority where the rule "does not invoke the outer limits of Congress's power or alter the federal-state framework").

comprising the Ninth Circuit, they will be subject to different and conflicting regulations of two different federal agencies depending on the kind of material discharged. And there will be further regulatory disparity, since the agencies will still be bound by their own regulatory division of responsibilities in the rest of the country. As in *NAHB*, the expert agencies looked at the issue carefully for decades and "harmonize[d] the statutes" based on their technical expertise. 127 S. Ct. at 2534 *Id.* By improperly substituting its judgment for that of the agencies, the Ninth Circuit upset that carefully crafted scheme and destroyed the uniformity reached by the agencies after years of experience. This sea change in the law warrants this Court's intervention.

2. The court placed itself further in conflict with this Court's precedents by holding that the agencies incorrectly interpreted their *own* regulations as subjecting discharges of fill material to permitting under Section 404 rather than Section 402. "An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *NAHB*, 127 S. Ct. at 2537-38 (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). Such deference is "all the more warranted" in a case like this, where "the regulation concerns 'a complex and highly technical regulatory program.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citation omitted).

Although the Ninth Circuit paid lip service to this standard, App. 19a, in reality it disregarded it. The agencies' joint regulation, promulgated in 2002, is unambiguous: a discharge will be permitted as fill material under Section 404 if it has the effect of "[c]hanging the bottom elevation" of the waters into

which it is discharged. 33 C.F.R. § 323.2(e)(1); 40 C.F.R. § 232.2(e)(1). Moreover, the agencies expressly provided that "fill material" includes the "placement of overburden, slurry, or tailings, or similar mining-related materials." *Id.* § 323.2(f). This continued the agencies' longstanding interpretation that "[d]ischarges listed in the Corps' definition of 'discharge of fill material,' remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8,871 (1986). And for more than 20 years, EPA regulations have provided that all discharges of dredged or fill material "do not require NPDES permits." 40 C.F.R. § 122.3(b).

There was no basis for the Ninth Circuit to hold that the agencies clearly misapplied or misinterpreted their own regulations. The court relied on stray statements in the preamble to the 2002 regulations, but that preamble cannot override the actual regulatory text. In any event, in the same preamble the agencies stated (1) that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material;'" (2) that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials;" and (3) that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. at 31,135 (emphases added).

The Ninth Circuit nevertheless held that the agencies "could not have been more clear" that fill material is not subject to permitting under Section 404 if it is covered by an effluent guideline. App. 29a. Like the court's statutory analysis, this holding defies both reality and this Court's precedents. When considered in light of the unqualified language

of the regulation, the 2002 preamble merely shows the agencies' longstanding understanding that any discharge meeting the regulatory criteria for "fill material" is subject to permitting under Section 404 and, for that reason, is not subject to permitting under Section 402.[7] The agencies' "steady interpretation" of their own regulation, without interference or disapproval from Congress, is entitled to great deference. *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001). But the Ninth Circuit gave it no deference at all. That error further warrants this Court's review.

II. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE.

Certiorari is further warranted because the question presented is one of fundamental importance both to Alaska and to the nation as a whole. The Ninth Circuit has erased the clear jurisdictional boundary that the federal agencies have set for themselves and followed for more than 20 years. In so doing, the court ensured that there would be different permitting regimes in the states comprising

---

[7] The Ninth Circuit also relied on pre-permit statements the agencies made about this project. App. 29a. As this Court has noted, however, earlier statements by an agency are irrelevant because the court is "empowered to review only an agency's *final* action." *NAHB*, 127 S. Ct. at 2530. The agencies' final action here was to agree that the discharge at issue was properly permitted under Section 404 as fill material. App. 36a. In any event, the Ninth Circuit misunderstood the statements upon which it relied. For example, although the court relied on a 2005 EPA statement indicating that the Kensington Project would be subject to effluent guidelines, App. 29a, that statement referred to the need for the Section 402 permit that was obtained for the discharge that would flow *from* the tailings impoundment, not into it. *See* SER 536, 539-40.

the Ninth Circuit than in the rest of the country. Many important mining operations would become impossible in those states because the tailings could not be disposed of. Other operations would become *more* environmentally harmful. And the State itself would be harmed, both because important economic development projects would be blocked and because the State expects to take over EPA's Section 402 permitting requirements and thus would effectively find itself unable to permit projects that it concludes are environmentally and economically sound.

1. The regulatory patchwork created by the Ninth Circuit is itself reason for this Court to resolve the issue. In the rest of the country, EPA and the Corps will continue to be bound by their own regulatory pronouncements subjecting all discharges of fill material to the exclusive regulatory jurisdiction of the Corps pursuant to the guidelines specifically developed under Section 404. The premise of the Ninth Circuit's ruling, however, is that fill material may nevertheless be considered a discharge of pollutants subject to Section 402's permit requirement. Thus, in Alaska and the other states in the Ninth Circuit, entities seeking to discharge fill material will be forced to seek two permits from two different agencies under two different standards, and will be unable to secure such a permit if, as here, an EPA effluent limitation is exceeded.

2. Breaching the settled boundary between the Corps' and EPA's jurisdiction will also have other wide-ranging effects. The impact of the Ninth Circuit's ruling just on the mining industry in Alaska is itself profound. Mining is particularly important to the State of Alaska, as the mineral industry comprises nearly 8% of the State's $41 billion

economy, and has been a primary growth area.[8] The regulatory requirements governing that industry in Alaska should be the same as in the rest of the country, yet as a result of the Ninth Circuit's decision mining projects that could receive permits in other states cannot receive them in Alaska. Mining also requires long-term planning, and the Ninth Circuit's overturning of the decades-old division of authority between the Corps and EPA has disrupted the regulatory predictability that is essential to that process.

The court has also stopped in its tracks a major economic activity—the Kensington Mine Project—that was the subject of more than 900 studies conducted over many years to demonstrate its environmental soundness. The Project involves a significant investment in Alaska and is expected to create hundreds of additional jobs for an area of Southeast Alaska that desperately needs them. *See* Jim Calvin, *The Kensington Project: Economic Impact Update* 4 (2007). But the issue goes beyond this one project. The Ninth Circuit's decision, if allowed to stand, would prohibit mining practices that are both environmentally sound and economically beneficial. Indeed, the record shows that subjecting tailings discharges to effluent guidelines "could potentially eliminate the ability for most economically viable and environmentally appropriate

---

[8] U.S. Dept. of Labor, Bureau of Labor Statistics, *Alaska Economy at a Glance* (2007) (noting mining as only subdivision of state economy with double-digit employment growth rate over last year); U.S. Dept. of Commerce, Bureau of Economic Analysis, *Gross Domestic Product By State* (2007); D. J. Szumigala & R. A. Hughes, *Alaska's Mineral Industry 2006: A Summary* 1-2 (2007).

mine designs to be permitted in Alaska," Decl. of Edmund J. Fogels ¶ 12 (filed Apr. 7, 2006) (R. 42), thereby having a deleterious effect on one of the State's most important industries and derivatively on the State's entire economy.

Mining operations must put their tailings somewhere and, as in this case, only a portion can be backfilled into the mine. The Corps asserts jurisdiction over vast amounts of areas it considers waters of the United States. This covers "half of Alaska," *Rapanos*, 126 S. Ct. at 2215, which is an area larger than all of Texas. *See also* U.S. Fish & Wildlife Service, *Status of Alaska Wetlands* 18 (1994). Accordingly, most mines in Alaska are unlikely to have suitable tailings disposal sites that do not include some wetlands or other regulated waters.

Under the Ninth Circuit's reasoning, however, no mining operation can be conducted where the tailings slurry will contact any waters of the United States, because such discharges will be subject to EPA's "zero discharge" requirement for process wastewater. Moreover, EPA effluent limitations for "total suspended solids" are measured in milligrams per liter for this sort of mine. 40 C.F.R. § 440.104. Effluent guidelines for other areas of the mining industry similarly limit the discharge of total suspended solids to milligrams per liter. *See, e.g., id.* §§ 434.22, 436.182. If applicable, these standards would obviously exclude the discharge of tailings, which are largely solid. Thus, the Ninth Circuit's decision, if allowed to stand, threatens significant harm to one of Alaska's most important industries by imposing impossible restrictions on tailings fill material that neither Congress nor EPA ever intended. Indeed, the enormous disparity between

the volume of tailings and other fill material and the restrictive EPA effluent limitations governing this industry shows that those limitations were never intended to apply to fill material.

Moreover, to the extent the Kensington Project or other mining operations could find a way to comply with the court's decision at all, the result may well be *more* harmful to the environment. The expert agencies concluded that the Kensington Project's proposed method of disposing of tailings is "the environmentally preferable alternative." SER 858. Under the Ninth Circuit's decision, however, mining operations will have to switch to less environmentally preferable alternatives, which could include unsightly and potentially deleterious tailings storage on uplands in enormous piles.

Nor is the impact of the decision limited to just mining. "'Discharge of fill material' is a broad category, covering many activities that involve earthmoving or discharges into wetlands." Sharon M. Mattox, *Regulatory Obstacles to Development and Redevelopment: Wetlands and Other Issues*, SN032 ALI-ABA 1571 (Oct. 19, 2007). When they promulgated their definition of "fill material" in 2002, the agencies identified a wide swath of potentially affected entities. 67 Fed. Reg. at 31,130. Indeed, so many parties are interested in the scope of the Corps' authority that the joint definition—which was intended to finally settle the dividing line between Sections 404 and 402—received over 17,200 comments. *Id.* at 31,131. EPA's effluent guidelines cover expansive ground as well. EPA has promulgated such guidelines for over 50 industry categories. *See* 40 C.F.R. Parts 405-471. Thus, the

issue in this case applies far beyond a single industry.

3. Finally, as evidenced by its intervenor status, the State has an independent regulatory interest that will be harmed if the Ninth Circuit's decision is allowed to stand unreviewed. "The states play important roles in the implementation of the Section 404 program." Kim Connolly et al., *Wetlands Law and Policy: Understanding Section 404* at 321 (2005). This includes the state certification required under Section 401 of the CWA, 33 U.S.C. § 1341, without which no Section 404 permit can issue. The CWA "provides for a system that respects the States' concerns," and "[s]tate certifications under § 401 are essential in the scheme to preserve state authority." *S.D. Warren Co.* v. *Maine Bd. of Environmental Protection*, 126 S. Ct. 1843, 1853 (2006).

The Ninth Circuit's decision has adversely impacted Alaska by nullifying state approvals and permits that entailed extensive expenditure of monetary and regulatory resources. More broadly, Section 401 gives Alaska an independent interest in the proper application of the CWA's jurisdictional boundaries, since the State is separately required to certify, *inter alia*, that any applicable provisions of Sections 301 and 306 have been complied with. 33 U.S.C. § 1341. Through their Section 401 authority, states such as Alaska are partners with the Corps in implementing the Section 404 program and share the need for clear boundaries to govern which discharges are subject to that permitting scheme.

Moreover, the Ninth Circuit's decision will likely have other long-term impacts on the State's own regulatory activities. Alaska has applied to take over Section 402 permitting authority from EPA, *see*

NAHB, 127 S. Ct. at 2530 n.5, and expects to receive that approval. Like EPA, however, Alaska does not understand that the authority it has asked to assume will include the authority to regulate, through application of effluent guidelines, discharges of fill material subject to the Corps' jurisdiction under Section 404. Based on this expected assumption of regulatory authority, Alaska has the same interest as the federal agencies in defending the proper division of regulatory authority.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

TALIS J. COLBERG
Attorney General
STATE OF ALASKA
Department of Law
P.O. Box 110300
Juneau, AK 99811
(907) 465-3600

JONATHAN S. FRANKLIN*
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466

CAMERON M. LEONARD
Assistant Attorney General
STATE OF ALASKA
Department of Law
100 Cushman Street
Suite 400
Fairbanks, AK 99701
(907) 451-2811

* Counsel of Record *Counsel for Petitioner*